

REMARKS/ARGUMENTS

This Amendment is being filed in response to the Final Office Action dated June 24, 2010. Reconsideration and allowance of the application in view of the amendments made above and the remarks to follow are respectfully requested.

Claims 1, 3-9, 11-14, 16, 17 and 19 are pending in the Application. Claims 1, 9 and 13 are independent claims.

Applicants thank the Examiner for acknowledging receipt and consideration of an Information Disclosure Statement filed on March 10, 2010.

In the Office Action, claims 1, 3-8, 11, 13, 14 and 16 are rejected under 35 U.S.C. §112, second paragraph. This rejection of claims 1 and 3-8 under 35 U.S.C. §112, second paragraph is respectfully traversed. However, in the interest of expediting consideration and allowance of the pending claims, the Applicants have elected to amend the claims in accordance with the suggestions contained in the Final Office Action. Further, the Applicants have also elected to similarly amend claim 9. Accordingly, it is respectfully submitted that claims 1, 3-8, 11, 13, 14 and 16 are in proper form and it is respectfully requested that this rejection under 35 U.S.C. §112, second paragraph, be withdrawn.

In the Office Action, claims 1, 3-9, 11-14, 16, 17 and 19 are rejected under 35 U.S.C. §103(a) over U.S. Patent Publication No. 2005/0126007 to Aviza ("Aviza"). The rejection of claims 1, 3-9, 11-14, 16, 17 and 19 is respectfully traversed. It is respectfully submitted that claims 1, 3-9, 11-14, 16, 17 and 19 are allowable over Aviza for at least the following reasons.

It is undisputed that Aviza lacks many features of the currently recited subject matter including:

1) "wherein the adjustable guiding member includes first, second, third and fourth inclined surfaces, the first and second inclined surfaces being joined and separated by a fifth surface that for a portion is substantially parallel to the one plane, the third and fourth inclined surfaces being joined and separated by a sixth surface that for a portion is substantially parallel to the one plane, the first and third surfaces are a first pair of mutually opposing inclined surfaces, the second and fourth surfaces are a second pair of mutually opposing inclined surfaces, and wherein a lateral displacement of the first opposing and second inclined surfaces in a direction parallel to said plane moves the third and forth inclined surfaces in the direction perpendicular to said plane." (See, Final Office Action, pages 3-4.)

2) the adjustable guiding member being adjustable in the claimed manner including above the plane as follows:

[claim 5] wherein the top surface of said adjustable guiding member is adjustable between and including a lowermost position, where the top surface of the adjustable guiding member is in said plane and an uppermost position, wherein said some distance where the top surface of the adjustable guiding member is above said plane;

[claim 11] wherein the at least one guiding member is adjustable to an uppermost position where the top surface of the at least one guiding member is disposed at a distance of greater than 2 mm above said plane and is adjustable to a lowermost position where the

top surface of the at least one guiding member is in said plane;

[claim 12] wherein the position of the at least one of the two guiding members is adjustable to an uppermost position where said top surface is disposed at a distance of greater than 2 mm above said plane and is adjustable to a lowermost position where the top surface of the at least one of the two guiding members is in said plane. (See, Final Office Action, page 5.)

3) wherein the adjustable guiding member is positioned to contact a portion of skin after the one or more blades. (See, Final Office Action, pages 6-7.)

Further, although listed as rejected in the Final Office Action, page 3, the Final Office Action fails to address other claims altogether including the claims recitations such as "a frame and spring means and wherein the adjustable guiding member is movably positioned in the frame, said top surface of the adjustable guiding member extends outside said frame, the spring means providing tension to press the first pair of mutually opposing inclined surfaces against each other and to press the second pair of mutually opposing inclined surfaces against each other" as recited in claim 7, "said spring means comprises a pair of helical springs" as recited in claim 8. It is respectfully submitted that since these claims are not referenced in the Final Office Action with regard to any prior art, it appears that other than the 35 U.S.C. §112, second paragraph of the independent claims, these claims are in condition for allowance and an indication to that effect is respectfully requested. Should this understanding be in error, then the Examiner is requested to provide a further Office Action setting out the rejection of these claims to provide the Applicants with an opportunity

to respond.

Regarding the Final Office Actions liberal position regarding Office Notice which is provided in rejecting each of the claims of the present application, the MPEP in §2144.03 in a section titled "Reliance on Common Knowledge in the Art or 'Well Known' Prior Art" makes clear that only in limited circumstances is it appropriate for an examiner to take official notice of facts not in the record or to rely on "common knowledge" in making a rejection and that such rejections should be judiciously applied. MPEP in §2144.03(A) is entitled "Determine When It Is Appropriate To Take Official Notice Without Documentary Evidence To Support The Examiner's Conclusion". Therein it states that (emphasis provided) "Official notice without documentary evidence to support an examiner's conclusion is permissible only in some circumstances. While "official notice" may be relied on, these circumstances should be rare when an application is under final rejection or action under 37 CFR 1.113. Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known. As noted by the court in *In re Ahlert*, 424 F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), the notice of facts beyond the record which may be taken by the examiner must be "capable of such instant and unquestionable demonstration as to defy dispute" (citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961))

The case law and MPEP makes clear that it would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts

asserted to be well known are not capable of instant and unquestionable demonstration as being well-known. For example, assertions of technical facts in the areas of esoteric technology or specific knowledge of the prior art must always be supported by citation to some reference work recognized as standard in the pertinent art. In re Ahlert, 424 F.2d at 1091, 165 USPQ at 420-21 ... In re Eynde, 480 F.2d 1364, 1370, 178 USPQ 470, 474 (CCPA 1973) ("[W]e reject the notion that judicial or administrative notice may be taken of the state of the art. The facts constituting the state of the art are normally subject to the possibility of rational disagreement among reasonable men and are not amenable to the taking of such notice.")

In fact, the courts are clear in stating that it is never appropriate to rely solely on "common knowledge" in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based. Zurko, 258 F.3d at 1385, 59 USPQ2d at 1697.

Accordingly, the Applicants respectfully traverse the Final Office Actions taking of Official Notice. It is respectfully submitted that the Applicants are entitled to an opportunity to examine the prior art that is used in rejecting the claims so that the Applicants may decide how to proceed. The Examiner's maintenance of rejecting each claim based on Official Notice deprives the Applicants of this opportunity and is inappropriate at this late stage of prosecution. Since facts Noticed must be of a type that is "capable of such instant and unquestionable demonstration as to defy dispute", the prior art should be produced as required.

The Final Office Action takes a position that "that such adjustment configurations are

old and well known in mechanical engineering/product manufacturing arts and one having ordinary skill in the razor art would certainly be familiar with the application of such incline plane configurations and the benefits thereof. (See, Final Office Action, page 4). This position is respectfully traversed. It is respectfully submitted that the noticed fact is not considered to be common knowledge or well-known in the art. For example, it is respectfully submitted that the Applicants have previously added significant structure to the claims in the immediately prior amendment and continued prosecution twice heretofore in an attempt to convince the Examiner to address the distinct differences between Aviza and the current claims. For example, the claims make clear that two pairs of inclined surfaces, separated by surfaces that are not inclined, are utilized for adjusting the adjustable guiding member. Yet these features of the claims are not even addressed in the Final Office Action including in any position taken with regard to Official Notice.

It is respectfully submitted that the Examiner should provide any references relied upon to make a clear record so that the Applicants can fairly consider how to move forward on this matter.

The MPEP in §2144.03(C) makes clear that "If Applicant Challenges a Factual Assertion as Not Properly Officially Noticed or Not Properly Based Upon Common Knowledge, the Examiner Must Support the Finding With Adequate Evidence" and such evidence is respectfully requested. It is respectfully submitted that as should be clear from the discussion above, the Final Office Action relies on Official Notice as the "principal evidence" upon which the rejection of the claims is based. Official Notice cannot be used in

this manner. As Section 2144.03(A) of the MPEP expressly warns, it is never appropriate to rely solely on Official Notice as the principal evidence upon which a rejection was based. Instead, Official Notice is only appropriate for facts and that serve to "fill in the gaps" in a rejection. (See, MPEP § 2144.03(A).) This is why official notice is to be judicially applied. (see, MPEP § 2144.03). It is unreasonable to conclude that the Final Office Action has used Official Notice to "fill in" a gap in this rejection since the identified gap is at a point of novelty that is being argued.

In summary, the Final Office Actions attempts at Official Notice are improper and traversed. Consequently, there are evidentiary gaps in the rejection of the claims that are fatal to a prima facie case of obviousness.

It is respectfully submitted that the razor apparatus of claim 1 is not anticipated or made obvious by the teachings of Aviza. For example, Aviza does not teach, disclose or suggest, a razor apparatus that amongst other patentable elements, comprises (illustrative emphasis added) "the adjustable guiding member includes first, second, third and fourth inclined surfaces, the first and second inclined surfaces being joined and separated by a fifth surface that for a portion is substantially parallel to the one plane, the third and fourth inclined surfaces being joined and separated by a sixth surface that for a portion is substantially parallel to the one plane, the first and third surfaces are a first pair of mutually opposing inclined surfaces, the second and fourth surfaces are a second pair of mutually opposing inclined surfaces, and wherein a lateral displacement of the first and second inclined surfaces in a direction parallel to said plane moves the third and forth inclined

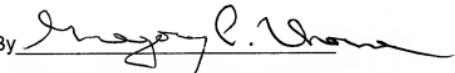
surfaces in the direction perpendicular to said plane" as recited in claim 1, and as similarly recited in claim 9 and 13.

Based on the foregoing including the lack of documentary evidence provided in the Final Office Action, the Applicants respectfully submit that independent claims 1, 9 and 13 are patentable over Aviza in view of Official Notice and notice to this effect is earnestly solicited. Claims 2-8, 11-12 and 14, 16, 17 and 19 respectively depend from one of claims 1 and 9 and accordingly are allowable for at least this reason as well as for the separately patentable elements contained in each of the claims. Accordingly, separate consideration of each of the dependent claims is respectfully requested.

In addition, Applicants deny any statement, position or averment of the Examiner that is not specifically addressed by the foregoing argument and response. Any rejections and/or points of argument not addressed would appear to be moot in view of the presented remarks. However, the Applicants reserve the right to submit further arguments in support of the above stated position, should that become necessary. No arguments are waived and none of the Examiner's statements are conceded.

Applicants have made a diligent and sincere effort to place this application in condition for immediate allowance and notice to this effect is earnestly solicited.

Respectfully submitted,

By 

Gregory L. Thorne, Reg. 39,398
Attorney for Applicant(s)
August 23, 2010

THORNE & HALAJIAN, LLP
Applied Technology Center
111 West Main Street
Bay Shore, NY 11706
Tel: (631) 665-5139
Fax: (631) 665-5101